GOVINARAJU NAGARAJAN A

v.

PACIFIC & ORIENT INSURANCE CO BHD

HIGH COURT MALAYA, PULAU PINANG B
S NANTHA BALAN JC
[APPEAL NO: 12A-45-05-2013]
17 SEPTEMBER 2013

CIVIL PROCEDURE: *Parties - Intervention - Insurer's application to intervene in running down action - Whether allowed - Whether insurer's legal and financial interests affected by outcome of action - Whether unjust to postpone determination of insurer's allegations of fraud and collusion to later and separate forum - Whether appropriate for all issues to be ventilated and determined in one action to prevent multiplicity of proceedings - Whether application to intervene bona fide and timeously made - Rules of Court 2012, O. 15 r. 6(2)(b)(ii)* C D

The issue in the instant appeal was whether an insurance company which, in reality, had conduct of the defence of its insured in a running down action could intervene and be added as a co-defendant in the proceedings on the suspicion that the parties in the action were colluding to make a false claim upon it. The Sessions Court before which the running down action was pending had allowed the insurer ('P & O') to intervene and be added as a co-defendant. Although it did not exhibit a copy of its loss adjuster's report to support its allegation, P & O claimed that the adjuster's investigations revealed its insured might not have been involved in the said accident and that the insured and the appellant herein (who was the plaintiff in the running down action) might be colluding to make a false claim upon P & O. In the action, the appellant claimed that his motorcycle was involved in an accident with a motorcycle ridden by the insured, which vehicle was insured by P & O. As was usually the case, P & O appointed its lawyer to conduct the defence for the insured to safeguard its interests as, barring certain exceptions, P & O would be liable to satisfy any judgment entered against the insured under s. 96 of the Road Transport Act 1987 ('the Act'). In the instant appeal, the appellant contended that the Sessions Court's decision was wrong as, *inter alia* (i) he had no cause of action against P & O unless and until the insured was found to be liable in the running down action. Hence, P & O had no right to intervene and force him to plead a case against it as a defendant; (ii) the court was E F G H I

precluded at the running-down-action stage from adjudicating on the allegation of fraud raised by P & O which should properly be dealt with if and when recovery proceedings were taken against P & O; and (iii) if P & O was made a defendant in the proceedings, its counsel's role would conflict with that of counsel for the insured although both counsel would be taking instructions from P & O. Arguing that the appeal should be dismissed, P & O contended, *inter alia*, that (i) not only should the Sessions Court's order be affirmed, P & O should also have control of the insured's defence to ensure that he did not admit liability and perpetrate the very fraud that was being alleged; (ii) recent decisions of the Court of Appeal that a plaintiff who had obtained judgment in a running down action was not required to file recovery proceedings under s. 96(1) of the Act to enforce the judgment against the insurer made it imperative that P & O was added as a party in the running down action so that the issue of fraud could be dealt with in those proceedings; (iii) as P & O had shown its legal and financial interests were directly affected by the outcome of the running down action, it should be allowed to be heard in that action; and (iv) no prejudice would be caused to the plaintiff's case if P & O was added as a party.

Held (dismissing appeal with costs):

(1) The fact that P & O's liability was only contingent upon its insured being held liable did not detract from its present right to intervene and be added as a party so that all issues affecting the insurer could be heard as it would be the ultimate paymaster if the insured was found liable. If the reasons or factual basis for intervention were made out and it was clear that the proposed intervenor's legal and financial interests were going to be affected, then discretion should be exercised in favour of intervention, regardless of whether liability was not vested but only contingent. (paras 52 & 55)

(2) The important and imperative question in situations such as the present one was not whether the insurer's liability was vested or contingent but whether there was an issue between the appellant and the insurer which was connected with the relief or remedy envisaged by O. 15 r. 6(2)(b) of the Rules of Court 2012. It was most unjust to P & O to require it to sit on the sidelines and wait for the running down action to be over before it could oppose or challenge the decision made in the action on the basis of fraud or collusion at a separate forum. (paras 54 & 74)

(3) If the appellant's submissions were upheld, the running down action would be tried without P & O's direct involvement as a party, with the result that the issue of fraud and collusion raised by it would be unlikely to be determined in the action as the appellant and the insured would obviously not bring it up themselves if such a collusive pact actually existed. Although counsel for the insured was appointed by P & O, the client, in law, was the insured and not P & O. Counsel would have to act in the best interest of the insured and argue on the basis that there was a genuine motor vehicular accident. Counsel could not act against the insured's interests and promote P & O's fraud and collusion theory. (paras 56, 62 & 60)

(4) At the stage of intervening, there should not be a heavy burden on the intervenor to establish its case for intervention. All that it had to show was that it had acted timeously and without *mala fide* and that the reasons for intervention were not baseless or frivolous or lacking in credibility. In the instant case, P & O had fulfilled all these conditions. (para 68)

(5) Allowing P & O to intervene in the running down action would avoid multiplicity of actions and wastage of the court's time and resources and quite possibly prevent the occurrence or perpetration of an injustice against P & O. It was only reasonable, sensible and appropriate that all issues be ventilated and determined in one action, rather than allowing the fraud and collusion issue to be taken up in another forum which opportunity might not even arise, given the recent Court of Appeal decisions which held that the plaintiff who had obtained judgment in a running down action need not file recovery proceedings against the insurer to satisfy the judgment. (paras 69, 70 & 71)

(6) The appellant was not being compelled to plead anything against P & O. Consequent upon the order for intervention, further orders or directions should be sought with regard to amendments to the cause papers to reflect P & O as second defendant and for the appellant's pleadings to reflect P & O's status in the running down action. It would be up to P & O to raise fraud and collusion in its defence which would in turn necessitate a response from the appellant. With appropriate and measured directions on amendment to pleadings, there

would be no scope for the appellant to employ the *Tajjul Ariffin* strategy to subvert and scuttle the order for intervention if such was the intention (*Tajjul Ariffin Mustafa v. Heng Cheng Hong*; dist). (para 72)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Arab Malaysian Merchant Bank Bhd v. Dr Jamaludin Dato' Mohd Jarjis [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 SC ***(refd)***

Badruzamani Azmi v. Kurnia Insurance (M) Bhd [2001] 4 CLJ 280 HC ***(not foll)***

Charles Osenton and Company v. Johnston [1942] AC 130 ***(refd)***

Clear Water Sanctuary Golf Management Bhd v. Ketua Pengarah Perhubungan Perusahaan & Anor [2007] 10 CLJ 111 HC ***(refd)***

Evans v. Bartlam [1937] 2 All ER 646 ***(refd)***

Fire, Auto and Marine Insurance Ltd v. Greene [1964] 2 QB 687 ***(refd)***

Gurtner v. Circuit [1968] 1 All ER 328 ***(refd)***

Johannes Koplan v. Aw Chen [1970] 1 LNS 42 FC ***(refd)***

Kimile Dangea v. MSIG Insurance (M) Berhad [2010] 1 LNS 1912 HC ***(foll)***

Lazarus Estates Ltd v. Beasley [1956] 1 QB 702 ***(refd)***

Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd [2011] 5 CLJ 866 CA ***(not foll)***

Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(foll)***

Pegang Mining Company Ltd v. Choong Sam & Ors [1968] 1 LNS 96 PC ***(refd)***

Pekan Nanas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 PC ***(refd)***

Re Crocker [1936] 2 All ER 899 ***(refd)***

Sundralingam v. Ramanathan Chettiar [1967] 1 LNS 173 FC ***(refd)***

Tajjul Ariffin Mustafa v. Heng Cheng Hong [1993] 3 CLJ 117 SC ***(dist)***

The Mayor, Aldermen, and Citizens of the City of Montreal v. Thomas Storrow Brown and James K Springle (Commissioners in Re Expropriation of St Joseph Street) (1876) 2 App Cas 168 ***(refd)***

Thomas Alvin Cross v. Thomson Thomas & Ors [2005] 6 CLJ 61 HC ***(foll)***

Legislation referred to:

Road Transport Act 1987, ss. 91(4), 96(1), (2)
Rules of Court 2012, O. 15 r. 6(2)(b)(ii), O. 45
Rules of the Supreme Court 1957, O. 16 r. 11
Rules of the High Court 1980, O. 15 r. 6
Rules of the Supreme Court [UK], O. 15 r. 6(2)(b)

For the appellant - Brijnandan Singh Bhar; M/s Brijinandan Singh Bhar & Co
For the respondent - Jaspal Singh Gill; M/s Gill & C Suren

Reported by Ashok Kumar

JUDGMENT

S Nantha Balan JC:

Introduction

[1] This case involves an allegation by an insurer that there is fraud and collusion between their insured (defendant) and the third party claimant (plaintiff) in a running down action. The insurers, who would be liable to satisfy any judgment against their insured/defendant by virtue of s. 96 of the Road Transport Act 1987, applied to intervene in the running down action, *albeit* that they were already having conduct of the defence in that action which was before the Sessions Court.

[2] Thus, the issue that arose for consideration in this case is whether in a running down action, where insurers are already having conduct of the defence on behalf of their insured/defendant, may nevertheless be allowed (under O. 15 r. 6(2)(b)(ii) of the Rules of Court 2012) to intervene and added as a co-defendant where they have reason to believe that there is fraud and collusion between the insured/defendant and the plaintiff.

[3] The matter came before me by way of an appeal by the plaintiff/appellant against the decision of the Sessions Court at Georgetown in Summons No: 53-455-05-2012 (the "running down action") which was handed down on 9 May 2013 allowing the notice of application filed by Pacific & Orient Insurance Co Berhad ("P & O"), the intervener/respondent and granting leave to intervene pursuant to O. 15 r. 6 of the Rules of Court 2012 and consequently that they be added as second defendant in the running down action.

[4] The running down action was filed on 30 May 2012. (See p. 8-13 of the appeal record - "AR"). The relevant facts in so far as the running down action is concerned are that on 5 September 2010 a motor vehicle accident occurred along the Jelutong Expressway involving motorcycles No: PFB 3845 and (allegedly) PHP 2167. The rider of motorcycle No: PFB 3845 was

the plaintiff/appellant, whereas the rider of motorcycle No: PHP 2167 was (allegedly) one Sri Jaimuralydasan a/l Munindi. In the running down action, Sri Jaimuralydasan a/l Munindi was named as the defendant. It is not in dispute that P & O was the insurer of motorcycle No: PHP 2167 at the material time of the motor vehicle accident.

[5] As the insurers, P & O were at risk under the policy of insurance and pursuant to s. 96 of the Road Transport Act 1987, would be liable to satisfy any judgment that may be made against Sri Jaimuralydasan a/l Munindi in the running down action.

[6] Section 96(1) of the Road Transport Act 1987 reads as follows:

> **96. Duty of insurers to satisfy judgments against persons insured in respect of third party risks**
>
> If, after a certificate of insurance has been delivered under section 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under section 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable there under in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

P & O Having Conduct Of The Defence

[7] P & O appointed a firm of solicitors namely Messrs K Suganthi & Company to file defence and generally to have conduct of the matter. The said firm of solicitors duly filed a defence dated 29 June 2012 on behalf of the defendant. (See: pp. 18 - 21 AR). Thereafter, the insurers carried out investigations through their appointed adjusters to, *inter alia*, verify the authenticity of the claim in all respects. As is the usual practice for motor claim cases, adjusters would investigate the liability and quantum aspects of the claim and ascertain whether the claim is exaggerated or fraudulent from the aspect of the damages sought for the pain and suffering and/or loss of earnings. They would also investigate whether there was any fraud in relation to the

occurrence of the accident and more significantly, whether the insured (quite possibly on the basis of a promise of some pecuniary benefit to be derived from any judgment that may be procured) was colluding with the plaintiff/claimant to set up a fraudulent claim against the insurers who, because of s. 96 of the Road Transport Act 1987 are statutorily liable to satisfy any judgment that is taken against their insured.

[8] In the present case, relying upon the outcome of investigations by the adjusters, P & O suspected that there was fraud and collusion between the plaintiff and the defendant, Sri Jaimuralydasan a/l Munindi. The suspicion in this case was that Sri Jaimuralydasan a/l Munindi was not involved in the motor vehicle accident and was colluding with the plaintiff/appellant. So even though they had appointed Messrs K Suganthi and Company to act for their insured and in order to protect their interest, P & O applied to intervene and be added as a co-defendant. That application was allowed by the Sessions Court and P & O were added as co-defendant in the running down action. This is the plaintiff's appeal against that order.

The Order For Intervention

[9] The order of the Sessions Court reads as follows (see p. 4 AR):

(i) Pemohon dibenarkan untuk mencelah dalam prosiding ini dan dinamakan sebagai defendan kedua;

(ii) Susulan dari perintah 2 *(sic)* di atas, plaintif diberi kebenaran untuk membuat pindaan terhadap tajuk Saman dan Pernyatan Tuntutan dan menyerahkan Saman dan Pernyataan Tuntutan Terpinda kepada Pemohon sebagai defendan kedua dan pemohon diberi kebenaran memfailkan Pernyataan Pembelaan sebagai defendan kedua;

(iii) Plaintif dan pemohon sebagai defendan kedua akan tertakluk kepada Kaedah-Kaedah Mahkamah 2012 seolah-olah pemohon dijadikan defendan kedua sejak perkara ini dimulakan oleh plaintif; and

(iv) Tiada perintah terhadap kos.

A **Mis-description Of Parties In The Notice Of Appeal And Appeal Record**

[10] For convenience, I shall refer to the appellant herein as "the plaintiff' and the respondent as "P & O". Sri Jaimuralydasan a/l Munindi shall be referred to as "the defendant". At the outset, I noted that the there was a mis-description of the parties in the notice of appeal dated 9 May 2013 and in the appeal record in that the defendant in the court below has been named as the respondent to the appeal and P & O has been named as intervener.

[11] It is not in dispute that in the court below and in the appeal before this court, the defendant took no part in the application to intervene. They stayed out of it. In the court below, the dispute was only between the plaintiff and P & O. Hence, the plaintiff, being dissatisfied with the order made in favour of P & O, should have cited only P & O as the respondent and served the appeal record on the solicitors for the defendant so that they may, if they so desired, turn up at the hearing of the appeal and take any position which deemed appropriate.

[12] In the present case, the naming of the defendant as the respondent was procedurally wrong. But counsel for P & O very properly did not object to the infirmity in the notice of appeal and was content to argue the appeal on its merits. In any event nothing really turned on that mis-description. But the title and identity of the parties had to be regularised otherwise there will be utter confusion all round. Hence, it was necessary that the nomenclature of the parties to the present appeal be rectified. As such, upon an oral application being made by counsel for the plaintiff, I ordered that the notice of appeal and the record of appeal be amended and that P & O be named as the sole respondent in this appeal.

The Brief Facts (The Evidence Of Fraud And Collusion)

[13] The plaintiff's claim in the running down action arose out of an alleged motor vehicle accident on 5 September 2010 which is said to have occurred at around 6.15pm between motorcycle No. PFB 3845 and motorcycle No. PHP 2167 along Jelutong Expressway, Penang. It is alleged that the plaintiff was the rider of motorcycle No: PFB 3845 and the defendant the rider of PHP 2167.

[14] The statement of claim (p. 10 AR) states as follows: A

> Pada tarikh yang tersebut di atas lebih kurang pukul 6.15 petang, Plaintif sedang menunggang motorsikal No. PFB 3845 dari Pusat Bandar menghala ke arah Jelutong Expressway apabila dia telah dilanggar oleh motorsikal No. PHP 2167 yang ditunggang oleh Defendan menghala ke arah yang sama telah tiba-tiba membelok ke kiri Plaintif dan mengesel motorsikal Plaintif. Akibatnya Plaintif tercedera. B

[15] P & O appointed Messrs K Suganthi & Company, Advocates & Solicitors to act for the defendant in view of their statutory obligations under the Road Transport Act 1987 and the said firm entered appearance for the defendant and (presumably upon taking the defendant's instructions) filed defence. This is what was stated in the defence, (at p. 18 paras. 3 and 4): C

> (3) Defendan merujuk kepada perenggan 3 Pernyataan Tuntutan dan menafikannya. Defendan menegaskan bahawa tiada perlanggaran berlaku diantara motosikal No. PFB 3845 dan motosikal No. PHP 2167, yang dipandu oleh defendan; D
>
> (4) Defendan menafikan keseluruhan pernyataan di perenggan 4 dan butir-butir kecuaian Defendan dan meletakkan Plaintif di bawah dasar bukti yang kukuh. Defendan juga menegaskan bahawa kemalangan tersebut adalah disebabkan keseluruhannya dan/atau secara alternatif kecuaian sumbangan plaintif iaitu penunggang motosikal No. PFB 3845 yang terlibat di dalam kemalangan tersebut. E F

(at p. 19 paras. e, f and g)

> (e) Dengan tiba-tiba dari arah yang sama cuba bergesel dengan motosikal yang ditunggang oleh defendan, defendan mengelak dan menyebabkan plaintiff telah hilang kawalan dan terus melanggar pembahagian jalan dan papan tanda; G
>
> (f) Cuba bergesel dengan motosikl defendan dan mengakibatkan perlanggran apabila plaintif telah terbabas dan melanggar pembahagian jalan dan papan tanda; dan H
>
> (g) Dengan tiba-tiba cuba bergesel dengan motosikal defendan.

(at p. 20 AR para. 5)

> Defendan menunggang motosikal No. PHP 2167 dari rumahnya yang terletak di Solok Sungai Pinang menuju ke tempat kerja di Bayan Lepas, Apabila sampai di Shell Jelutong Expressway, tiba-tiba sebuah motosikal No. PFB 3845 yang ditunggang oleh plaintiff dari arah yang sama cuba bergesel dengan motosikal I

A defendant Defendan mengelak dan menyebabkan plaintiff terkejut dan terus hilang kawalan lalu melanggar pembahagi jalan dan juga papan tanda.

[16] In the police report which was lodged on 14 October 2010 the plaintiff said that: (at p. 34 AR)

B

> Pada jam lebih kurang 6.15 petang tarikh 5/9/2010, saya menunggang motosikal No. PFB 3845 jenis Modenas Kriss dari pusat bandar hendak batik ke rumah melalui Jelutong Expressway. Apabila sampai di Shell Jelutong Expressway, semasa itu saya
> C berada di lorong kiri dan tiba-tiba sebuah motosikal No. PHP 2167 yang datang dari arah sebelah kanan terus membelok masuk ke kiri saya. Saya terkejut dan tidak sempat brek dan elak terus bergesel dengan motosikal tersebut dan saya terbabas terlanggar pembahagi jalan dan langgar papan tanda di hadapan saya. Saya terjatuh dan mengalami cedera kaki kiri. Motosikal saya mengalami
> D kerosakan di bahagian hadapan kiri dan kanan. Lain-lain kerosakan serta kerugian belum tahu lagi.

[17] Next, on 26 October 2010 the defendant lodged a police report where he said:

E

> Pada jam lebih kurang 6.00 petang tarikh 5/9/2010, saya menunggang motosikal bernombor PHP 2167 jenis Scooter Yamaha Ego-S dari rumah saya hendak ke tempat kerja saya di Bayan Lepas. Apabila saya sampai di Shell Jelutong Expressway, tiba-tiba sebuah motosikal yang bernombor PFB 3845 jenis
> F Modenas Kriss cuba mengesel saya dan saya mengelak motosikal Modenas itu. Penunggang itu terkejut terus melanggar pembahagi jalan dan papan tanda. Saya dan motosikal saya tidak mengalami kerosakan dan kecederaan.

[18] The medical report of the plaintiff (p. 38 AR) dated
G 7 August 2011 states that:

> Medical Report on Govinaraju a/l Nagarajan
> Age: 21 years old Sex: Male
> NRIC: 6890705-06-5427 Unit: Orthopedic
> Registration No. :799109
>
> H
>
> The above patient was admitted in this hospital on 5.9.2010 and discharged on 14.91010 for alleged motor vehicle accident on 5.9.2010 at 6.30pm (*Motorbike vs. Divider*) ...

I **[19]** However, P & O suspected or had reason to believe that there was fraud and/or collusion between the plaintiff and defendant and filed a notice of application to intervene. P & O doubted whether an accident did in fact occur on 5 September

2010 at 6.15pm involving motorcycle No. PFB 3845 and motorcycle No: PHP 2167. P & O's suspicion is predicated on the following:

(i) The plaintiff was admitted in Hospital Pulau Pinang immediately after the accident. The medical report from Hospital Pulau Pinang, (see p. 38 AR) stated that:

> The above patient was admitted in this hospital on 5.9.2010 and discharged on 14.9.2010 for alleged motor vehicle accident on 5.9.2010 at 6.30pm (*Motorbike vs. Divider*).

(ii) That the identity card number of the plaintiff in his medical report is stated as 6890705-06-5427 whereas in his police report it is 890705-06-5427;

(iii) The plaintiff lodged his police report on 14 Oct 2010, ie, 39 days after the alleged accident although according to his medical report he was discharged on 14 Sept 2010;

(iv) The defendant lodged his police report on 26 Oct 2010, ie, 51 days after the alleged accident although he did not sustain any injury according to his police report;

(v) The sketch plan drawn by the investigating officer did not reveal any glass fragments or debris from the accident;

(vi) No police photographs were taken or tendered to show that motorcycle No: PHP 2167 sustained any damage; and

(vii) P & O's adjusters interviewed the defendant on salient aspects of how the accident occurred and the defendant allegedly gave conflicting statements from what was stated in his police report.

[20] Based on the above, P & O believed that there is a strong possibility that the plaintiff and defendant have colluded to lodge false police reports regarding the accident on 5 September 2010 to enable the plaintiff make a claim against P & O as the insurers of motorcycle No: PHP 2167.

[21] On the other hand the plaintiff's response or explanation, in what appears to be an attempt at repudiating the charge of fraud and/or collusion as between the plaintiff and the defendant was as follows. According to the plaintiff:

(i) P & O's assertion that the medical report states that the plaintiff collided into a divider is clearly hearsay and is not admissible. In any event, the plaintiff says that after the motorcycles grazed each other, the plaintiff collided into the road divider.

(ii) As for P & O's allegation that the identity card number of the plaintiff in his medical report being stated as 6890705-06-5427 whereas in his police report it is 890705-06-5427, the plaintiff says that the only difference is six and eight in the commencement of the identity card number and is obviously a typographical error. This is also not a relevant criteria. The real question according to the plaintiff is whether the name of the plaintiff is the same in each document and the answer in this regard is in the affirmative. Also, the age of the plaintiff is clearly set out in the medical report as 21 years old. As such the first digit in the identity card number should be eight and not six.

(iii) As regards the point made that the plaintiff lodged his police report on 14 October 2010 whereas he was discharged on 14 Sept 2010, the plaintiff says that the law does not require the plaintiff to lodge a report immediately upon discharge. He is not required to put himself at risk. He is entitled in law to seek full treatment and upon his discharge to go to the police station to lodge a police report only when he is feeling better. In any event this cannot be held against him as he was in hospital and no police officer went to see him to record his police report. The plaintiff also states that there is nothing fraudulent about the plaintiff's claim merely because of the defendant lodging his police report 51 days after the accident. The plaintiff has suggested that in all probability the defendant saw that no report had been lodged by the plaintiff so he felt that there was no need not lodge a report. But when he discovered that the plaintiff lodged a report, he later went ahead and lodged his report.

(iv) As for the sketch plan and key not having any marks or glass splinters, the plaintiff says that that should not be surprising when the investigating officer could only have gone to the scene after the plaintiff had lodged his police report and by no means could glass fragments be expected to be found some 39 days after the accident. P & O's allegation that the investigator appointed to investigate found discrepancies in the manner of the collision as stated in the defendant's police

report, is of no value as the interview statement was not been exhibited. As such, it is, according to the plaintiff, an unsubstantiated allegation.

(v) There is absolutely no evidence of collusion and if P & O are convinced that there was collusion, it is strange that they have not lodged a police report and let the police investigate. Thus, the plaintiff says that the grounds set out by P & O for intervening are without foundation and have no basis and P & O has no locus to make the application.

[22] Ultimately, on 9 May 2013 the Sessions Court allowed P & O's application and gave leave to intervene in the above proceedings and added them a second defendant. Dissatisfied by the decision, the plaintiff appealed to this court.

The Application To Intervene

[23] P & O's notice of application to intervene was made under O. 15 r. 6(2) Rules of Court 2012 which provides as follows:

> (2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application -
>
> (a) ...
>
> (b) order any of the following persons to be added as a party, namely -
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the caused or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

Intervention - The Law

[24] In *Arab Malaysian Merchant Bank Bhd v. Dr Jamaludin Dato' Mohd Jarjis* [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 it was held that one of the principal objects of O. 15 r. 6 of RHC 1980,

which replaces O. 16 r. 11 of Rules of Supreme Court 1957, is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without giving this person an opportunity of being heard. In that case the court also referred to the opinion of the Privy Council in *Pegang Mining Company Ltd v. Choong Sam & Ors* [1968] 1 LNS 96; [1969] 2 MLJ 52 ("the *Pegang Mining*'s case"), where it was enunciated that to achieve that object calls for a flexibility of approach which made it undesirable, to attempt to lay down any proposition which could be applicable to all cases. In that case also, the court recognised that as a result of the decision of the English Court of Appeal in *Gurtner v. Circuit* [1968] 1 All ER 328, intervention may be allowed in respect of a person who is directly affected not only in his legal rights (as provided for under O. 15 r. 6 RHC 1980) but in his pocket as well.

[25] In the present case, counsel for the plaintiff submitted that P & O's liability was a contingent one, in that it crystallises only upon judgment being entered against their insured/defendant and until such time that that happens, P & O's liability is inchoate. Essentially, it was submitted that the plaintiff has no cause of action against P & O until judgment has been obtained by the plaintiff against the insured/the defendant. The submission of counsel for the plaintiff was predicated entirely on the decision of the late Vincent Ng J in *Badruzamani Azmi v. Kurnia Insurance (M) Bhd* [2001] 4 CLJ 280; [2001] 6 MLJ Supp p. 481 ("*Badruzamani*'s case") where in a running down action, the insurers applied to intervene and failed. In that case it was held that the insurer should not be allowed to intervene as the insurer's liability was merely "contingent" on a judgment being obtained against its insured. Vincent Ng J, said:

> It is my considered opinion that a vehicle insurer's liability under s. 96(1) of the Act is a contingent statutory liability - a liability wholly and exclusively created by statute and contingent upon judgment obtained by the claimant. Thus, during the currency of the proceedings between the claimant and the insured, there are no issues - not even fraud - that could be pleaded or litigated until the strict liability provision under s. 96(1) of the Act is triggered into operation upon conclusion of the trial. The insurer's rights are not prejudiced even if they are not, at this stage, allowed to be made a party since they are not at all in law precluded from pleading fraud during the execution stage. It is trite that fraud, if proven, is a good defence even in cases of strict statutory liability situations such as s. 96(1) of the Act.

[26] However, the decision of Vincent Ng J in *Badruzamani* (*supra*) has not been followed in a number of subsequent decisions of the High Court all of which involved with applications by insures to intervene in running down matters where they suspected that there was fraud and/or collusion between their insured and the plaintiff.

[27] In *Thomas Alvin Cross v. Thomson Thomas & Ors* [2005] 6 CLJ 61, the court held that the insurer who suspected that there was fraud and/or collusion as between the insured and the plaintiff, could intervene. This is what was said in that case:

> Referring this court to Hong Kong's Court of Appeal decision on *Chu Yuen Wah v. Lee Koh Kwok & Anor* [1995] 3 HKC 629 counsel for the insurance company drew this court's attention to the *ratio decidendi* of that case ie, jurisdiction under O. 15 was wide enough to permit the joinder of a party whose liability to pay was contingent not only upon the outcome of the proceedings which it sought to join but also upon any other event or proceedings. The whole basis of the rule was to enable a person not a party to protect his rights when necessary so that natural justice could be done to him. There was nothing or contrary to the principle in permitting a party to raise alternative defences in the same case. To this principle I can't agree more. The presence of the insurance company before the court would be necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon in accordance with the rule. This view is further fortified by a Privy Council's decision in *Pegang Mining Co Ltd v. Choong Sam & Ors* [1969] 2 MLJ 52. It reads *inter alia* "(2) One of the principal objects of O. 16 r. 11 is to enable the court to prevent injustice being done to a person whose right will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach".

In that case, the court referred to *Guliner v. Circuit* [1968] 1 All ER 328 where Lord Denning MR had this to say:

> ... when two parties are in dispute in an action at law, and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party or on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute to "be effectually and completely determined and adjudicated upon" between all those directly concerned in the outcome.

[28] Next, in *Kimile Dangea v. MSIG Insurance (M) Bhd* [2010] 1 LNS 1912; [2013] 7 MLJ 576 it was held that:

> Order 15 r. 6(2)(b) of the Rules of the High Court 1980 (RHC) did not bar a non-party from being added as a defendant in a case where liability was merely 'contingent' as it was widely worded. 'Contingent' meant 'dependent'. It meant liability depended on a judgment against the first defendant, However, since s. 96 enjoined the insurance company to pay damages if liability for the accident was proven against the first defendant, another way of looking at the legal position under the said provision was that there was 'an issue' between the plaintiff and the insurer 'connected' with the 'relief or remedy' as envisaged by O. 15 r. 6(2)(b) of the RHC.
>
> In the premises, it would be inimical to the interests of the respondents to step into the shoes of the first defendant at the trial even if the insurance policy allowed them to do so. If the respondent's allegation of fraud was put in abeyance until the action between the appellant and first defendant was concluded, surely there would be another trial at the recovery stage. In the second trial, the crucial issue whether collusion between the appellant and the first defendant occurred would come to the fore again and require determination. This would defeat the very aim of O. 15 r. 6(2) of the RHC which was to avoid multiplicity of actions.

[29] Finally, in *Khairah Othman v. Kurnia Insurance* (Mahkamah Tinggi Shah Alam Rayuan Sivil No: Al2-723-2010), the court was of following opinion:

> I agree with the decision of Justice Azhar Maah in *Thomas Alvin*. I have no doubt that in the instant appeal, adding Kurnia Insurance as the 3rd defendant would enable all matters in dispute to be effectually and completely determined and adjudicated upon.

Further, in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947 Ramly Ali JCA said at p. 957:

> Nowhere does s. 96(1) of the Road Transport Act 1987 say that the respondent must first obtain another judgment against the appellant before she can proceed to enforce the judgment earlier obtained by the respondent against the insured. Therefore, the question of the respondent having to file a recovery proceedings under s. 96(1) against the appellant, as contended by the appellant in its memorandum of appeal, does not arise at all. In short, the respondent, who had obtained a monetary judgment against the insured

which has not been stayed, has the right under s. 96(1) to enforce the said judgment against the insurer without having to first file a recovery proceedings against the insurer.

Having regard to the above judgment of the Court of Appeal, the submission of learned counsel for the Plaintiff that Kurnia Insurance cannot come into the picture at the trial between the plaintiff and its insured until judgment is given and the Kurnia Insurance has to wait on the side lines for its turn in the execution or recovery proceedings can no longer be sustained as there need not be a recovery proceedings before the plaintiff could enforce the judgment.

Further, if there need not be a recovery proceedings before the plaintiff could enforce the judgment against the insurer, then more so the insurer's application to be brought in as a party should be allowed. Otherwise, the insurer would have no recourse to raise its defences as the plaintiff, armed with the judgment obtained against the insured can straight away turn to the insurer for enforcement without a separate recovery proceedings.

[30] As such, it was submitted by counsel for P & O that the *Badruzamani* approach should be discarded as it no longer represents the current position of law. Also, counsel for P & O submitted that in the light of the pronouncement by the Court of Appeal in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* that a plaintiff in a running down action who is armed with a judgment need not file recovery proceedings against the insurance company to enforce that judgment, it is all the more imperative that the insurer be allowed to intervene and added as a party so as to safeguard the interest of the insurer.

[31] It was further submitted for P & O that it was necessary for them to intervene in the proceedings and that if they are not allowed to intervene in this matter, the defendant may fraudulently admit his involvement in the accident and the Sessions Court may then make a finding that his vehicle was involved and give judgment against the defendant, in which event, P & O would have to pay the judgment sum to the plaintiff pursuant to its statutory obligation under s. 96(1) Road Transport Act 1987.

[32] Hence, it was submitted for P & O that they had satisfied the test of financial and legal interest as laid down in *Arab Malaysian Merchant Bank Bhd v. Dr Jamaludin Dato' Mohd Jarjis* and that P & O's presence in the running down action is also necessary so that all matters can be litigated and properly decided by the Sessions Court before judgment is pronounced. It was also

submitted that there is no prejudice at all to the plaintiff if P & O is allowed to intervene in these proceedings, as the plaintiff would still be calling the same witnesses to prove its case and there is no additional burden on the plaintiff by allowing P & O a right to participate in these proceedings.

[33] On the other hand, counsel for the plaintiff submitted that the contract of insurance is between P & O and the owner of the insured motorcycle and that the plaintiff is not privy to that contract and only derives a right to sue on the insurance policy given by the insurer to its insured by virtue of s. 96(1) of the Road Transport Act 1987. Therefore the plaintiff's right under s. 96(1) Road Transport Act 1987 only arises after the plaintiff has taken judgment against P & O's insured.

[34] In other words, according to the plaintiff, if there is no judgment against the insured, then the plaintiff has no cause of action against P & O, as the insurer. Counsel further made the point that even when the plaintiff has taken judgment against P & O's insured, P & O still has defences provided to it by s. 96(2) Road Transport Act 1987 and which are:

(a) That the plaintiff must prove that the certificate of insurance under s. 91(4) RTA 1987 has been issued and delivered to the insured;

(b) That before or within seven days of filing of proceedings the plaintiff has given notice to the insurer to the defendants;

(c) An execution on the judgment has been allowed; and

(d) If before the happening of the event the policy had been cancelled.

[35] It was submitted that the plaintiff has not as yet obtained judgment against the defendant and therefore P & O has no direct part to play in the proceedings. Their right only arises if and only if s. 96(1) Road Transport Act 1987 is triggered off or set in motion.

[36] According to counsel for the plaintiff, in Malaysia the insurer takes conduct of the action once proceedings are filed and the insurer is the one that appoints solicitors and pays for the solicitors, and gives all instructions as to the future conduct of the proceedings including settling claims as they deem fit and proper. The insured driver is only a nominal defendant. The policy of

insurance in Malaysia gives that right to the insurer to conduct the proceedings in the name of the defendant. *Johannes Koplan v. Aw Chen* [1970] 1 LNS 42; [1970] 1 MLJ p. 220 the Federal Court was cited for the following proposition:

> The negligent driver is only the nominal Defendant, whereas the party injuriously affected by an award of damages is the insurer by and in whose interest the action should be defended.

[37] Also, *Gurtner v. Circuit* [1968] 1 All ER 328; [1968] QB 587, was referred to in aid of the plaintiffs position that P & O should not be allowed to intervene. The premise of that submission is that P & O are already having conduct of the defence on behalf of the insured pursuant to the contract of insurance between P & O and the insured, In *Gurtner v. Circuit*, the Motor Insurer's Bureau ("MIB") was allowed to be added as defendants to the plaintiff's running down action solely because MIB had no contractual right to conduct the defence of the said action in the name of the assured. In that case, MIB were allowed to be added as defendants only upon their undertaking to pay to the plaintiff any damages that may be awarded against the defendant - notably, such undertaking would be wholly unnecessary in our jurisdiction in view of s. 96(1) of the Road Transport Act 1987. In *Gurtner*'s case, the insurer's predicament under the then English legislation was well expressed by Lord Denning MR as follows: (at p. 331):

> In pursuance of that order, the plaintiff sent the writ in a letter to the defendant at that address. It, of course, never reached him. The Royal Insurance Co Ltd, did not know his whereabouts any more than anyone else. They had no authority to enter an appearance on his behalf. Nor had the Motor Insurer's Bureau. No one had any authority to enter an appearance on his behalf. It looked as if judgment would go against the defendant by default unless something was done. One may ask: why should anyone worry if judgment did go against the defendant by default? The answer is that the Motor Insurer's Bureau had every reason to worry. They had entered into an agreement with the Minister of Transport by which they promised to pay any judgment against a motorist if it was not satisfied by his insurer within seven days. Faced with this obligation, the Bureau were desirous of coming into the proceedings. They wanted to investigate the plaintiff's claim. They had got the statements of one or two witnesses who said that the plaintiff was himself to blame because he ran across the road.

A And His Lordship went on to decide (at p. 333), that:

> I would, therefore, allow the appeal. The Motor Insurer's Bureau should be added as defendants and be entitled to defend the action and to exercise all the rights of the defendant therein. The Motor Insurer's Bureau undertake to pay to the plaintiff any
B damages that may be awarded against the defendant.

[38] Counsel for the plaintiff further submitted that in England it is different and as Vincent Ng J said in *Badruzamani*'s case (*supra*).

C > What is clear from the discussion in the above two cases is that: firstly, vehicle insurer have a right to be made a party to a running down action only when the terms of the policy do not give the insurer a contractual right to conduct the defence in the name of the assured; and secondly, any dispute between the insurer and the plaintiff's pertaining to the insurer statutory liability
D will only come about after the judgment has been entered, and thirdly, the critical criterion in *Gurtner*'s case is that the Motor Insurer's Bureau were allowed to enter as co-defendants solely to plead the defendant's case and not their own case - whereas in the instant case, Kurnia had sought to plead their own case against the defendant and plaintiff grounded upon fraud. Without
E such judgment, Kurnia would seem to have jumped the gun' and had filed a premature application 'to intervene, It is helpful to note that at all stages of the proceedings the respondent's (insurer's) rights are not prejudiced, mindful that s. 96(2)(a) of the Act also provides as follows:

F > (2) No sum shall be payable by an insurer under sub-s (1) -
>
> (a) In respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of
G the proceedings.
>
> Thus, the insurer has a statutory right to be informed of the proceedings right from its inception, Should the plaintiffs fail to give notice of the judgment to the insurer, the insurer need not heed the court's judgment.

H

[39] Thus counsel for the plaintiff submitted that P & O only has a contingent interest and not a vested interest at that stage of the proceedings. It will have a vested interest or rather that the interest would crystallise only upon a judgment having been
I obtained against the defendant, its insured. The plaintiff maintains that as the liability of a vehicle insurer could be triggered off or set in motion only upon invocation of s. 96(1) of the Road Transport Act 1987 by the claimant in a negligence suit at the

enforcement stage, it is neither within the province of nor permissible for the court to adjudicate on the status of the insurer's liability (through a finding on fraud) prior to enforcement of the judgment by the successful claimant in the suit. In other words, during the currency of the running down action, the court below is precluded from adjudicating or making a finding on the issue of fraud until s. 96(1) of the Road Transport Act 1987 is set in motion.

[40] It was argued for the plaintiff that P & O grounded its application on an allegations of fraud and, if proved, constitutes a valid and potent global defence in law against virtually all claims including a claim based on statutory liability such as s. 96(1) of the Road Transport Act 1987, notwithstanding the proviso therein pertaining to avoidance and cancellation of the policy. Of course, it is trite that fraud unravels everything. See: Denning LJ in a famous *dictum* in *Lazarus Estates Ltd v. Beasley* [1956] 1 QB 702 @ 712 where he said, "No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever ...".

[41] The plaintiff's point in this appeal was that P & O should not be alarmed or perturbed even if there was fraud and collusion between the plaintiff and the defendant as they (P & O) would have an opportunity to raise all these issue during the stage of recovery or execution where everything can be unravelled.

[42] Finally counsel for the plaintiff raised the pleadings point, ie, that if P & O are allowed to intervene and be added as a co-defendant, then P & O cannot force the plaintiff to plead particulars as against P & O. Taking it a step further, it was submitted that if P & O is added as a co-defendant, then it tantamounts to compelling the plaintiff to add another defendant, against whom the plaintiff does not want to proceed. This issue was canvassed in *Tajjul Ariffin Mustafa v. Heng Cheng Hong* [1993] 3 CLJ 117 at p. 126 ("*Tajjul Ariffin*'s case") where Edgar Joseph Jr SCJ said that, "a plaintiff cannot be forced to have a second defendant added against whom he does not want to plead a case and he should only be allowed to proceed against the defendant of his choice".

[43] Hence, similarly, it was submitted that a plaintiff in a running down case has no case to plead against the insurer as in law it cannot sue the insurer until judgment is entered against their insured as provided for in s. 96(1) of the Road Transport Act 1987. Therefore, taking out intervener proceedings is an act of futility in cases where the insured/defendant has already entered a defence. It was also highlighted that the Federal Court in *Pekan Nanas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ p. 465 confirmed the decision of the Supreme Court in *Tajjul Ariffin*'s case (*supra*).

[44] As such, it was submitted that the plaintiff has no recourse to P & O before he has taken judgment against the insured and likewise P & O has no right to be made an intervener in the running down action. The enforcement of the judgment against the intervener after obtaining judgment against the intervener's insured is known as a recovery action. The liability and recovery action are distinct from each other. To this end, counsel for the plaintiff relied upon *Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd* [2011] 5 CLJ 866; [2011] 4 MLJ at p. 541 where the distinction was made by the Court of Appeal in the following passage:

> The liability and recovery actions were distinct from each other. The former was founded on tort, to determine negligence; the latter was based on a statutory right under the RTA which included the construction of the terms of the insurance policy and the application of s. 91 and s. 96 of the RTA. For this reason alone it was unjust to bar the respondent from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue in the recovery action (see paras. 20 & 21).

[45] According to the plaintiff, P & O will have its day in court in the recovery action when the plaintiff files for execution under O. 45 Rules of Court 2012. P & O can set up all the defences that it has. But until such time P & O must wait by the side lines until the plaintiff proceeds against the insurer.

[46] The plaintiff's counsel then posed the question whether P & O can wear both hats ie, on the one hand P & O already has conduct of the matter on behalf of the defendant (their insured), wherein they have appointed solicitors who have filed defence and are still on record for the defendant and at the same time, seeking to intervene in the running down action.

[47] Further, as at the date of the intervener application in the Sessions Court and as at the date of hearing of the appeal in the High Court, P & O has not requested Messrs K Suganthi & Company to discharge themselves. Yet, P & O are insisting on intervening, *albeit* they are already having conduct of the defence through their appointed solicitors. It was submitted by the plaintiff that there will be conflict of interest as both counsel for the defendant and for P & O will have conflicting roles, but both of whom will be taking instructions from P & O. It was suggested that P & O have to discharge their solicitors from acting for the defendant as they have made very serious allegations of fraud against both the plaintiff and their own insured (the defendant) but yet failed and/or refused to lodge a police report so that the police can conduct an investigating into the serious allegation of fraud.

[48] On the other hand, it was alleged by learned counsel for P & O that if they discharged the solicitor acting for the defendant, then the defendant may collude with the plaintiff and this will pave the way for judgment to be entered against the defendant and the plaintiff can then proceed to recover the judgment against P & O. Counsel for P & O also alluded to the difficult position that Messrs K Suganthi find themselves in. On the one hand they are on record as solicitors for the defendant but at the same time they are taking instructions from P & O. In any event, Messrs K Suganthi & Company are in an invidious position and will not be able to cross examine their own client and/or make any suggestion of fraud or collusion that is alleged to exist between the defendant and the plaintiff.

Findings Of The Court

[49] It is obvious that the approach taken by the court in *Badruzamani*'s case (*supra*) is a restrictive one and represents an altogether inflexible stance which does not sit well with the salutary pronouncement by the Privy Council in *Pegang Mining*'s case which calls for flexibility of approach.

[50] To my mind, the decision in *Badruzamani* should be confined to its own facts and should not be read as laying down any proposition of law of general applicability. In any event, being a decision of a court of co-ordinate jurisdiction, that decision, whilst deserving the respect and deference that is due to it, is by no means binding on this court. (See: *Clear Water Sanctuary Golf*

Management Bhd v. Ketua Pengarah Perhubungan Perusahaan & Anor [2007] 10 CLJ 111; [2007] 6 MLJ 446. *Sundralingam v. Ramanathan Chettiar* [1967] 1 LNS 173; [1967] 2 MLJ 211 at p. 213).

[51] Also, it is important to bear in mind that when *Badruzamani*'s case was decided, the position in law was that the successful plaintiff had to commence a separate recovery action against the insurer, whereas now the position is or appears to be, following the decision of the Court of Appeal in *Pacific Orient & Co Bhd v. Muniammah Muniandy*, that it is not necessary for any recovery action and that the plaintiff can proceed to enforce the judgment directly against the insurer.

[52] In *Badruzamani*'s case, intervention was refused *inter alia*, because it was held that the insurer's liability was a contingent one and therefore fell outside the scope of intervention. In my view, if the reasons or the factual basis for intervention are made out and it is clear that the proposed intervener's legal and financial interest are going to be affected, then the discretion should be exercised in favour of intervention, regardless of whether the liability is a contingent (or deferred one) as compared to a vested liability. A close examination of the *Badruzamani* case will reveal that there is no legal foundation for the proposition that in spite of there being a factual basis, intervention should be denied to a party whose liability is contingent or deferred.

[53] I am of the view that the *Badruzamani* case which postulates that intervention should be denied to no insurer who has a contractual right to defend the action, *albeit* in the name of the insured, is not justifiable as a matter of principle. It is material to note that in the cases that were examined by the court in *Badruzamani*'s case there were no issue of fraud and collusion between the claimant and the insured. They were mostly concerned with the right of the Motor Insurer's Bureau's attempt to intervene in the proceedings. Critically, it should be noted that Lord Denning had in *Gurtner v. Circuit* indicated that he preferred the "wider interpretation" to O. 15 r. 6(2)(b) of the UK Rules of Supreme Court rather than the restrictive one adopted by the court in *Fire, Auto and Marine Insurance Ltd v. Greene* [1964] 2 QB p. 687 ("Fire, Auto and Marine") which is a case which he declared as having been wrongly decided and should be overruled. It may be noted that it was the decision of Stephenson J in *Fire, Auto and Marine* that gave rise to the percept that intervention should be denied to an insurer who has a contractual right to defend the action. That percept seemed to find favour with

Diplock LJ in that case (see p. 336 of the report). The court in the *Badruzamani*'s case took the narrow interpretation of the same procedural provision and felt compelled to conclude that there is such a precept or rule so as to deny intervention to an insurer even where the insurer may contractually have the right the defend the action but where legally it may not be able to control the insured's conduct during the trial. For my part, I am not inclined to follow the narrow approach to the procedural jurisprudence on intervention that was taken in the *Badruzamani*'s case. Also, the dichotomy between vested or immediate liability and contingent liability that seemed to have dictated the outcome in the *Badruzamani*'s case was an unnecessary distraction and effectively took the court way from the real question.

[54] In my view, in situations such as the present one, the important and imperative question as was rightly pointed out in *Kimile Dangea v. MSIG Insurance (M) Berhad* is not whether the liability is a vested one or a contingent one but rather, whether there is an issue between the plaintiff and the insurer which is connected with the relief or remedy as envisaged by O. 15 r. 6(2)(b) of the ROC.

[55] Accordingly, the fact that P & O's liability is contingent upon liability being found against their insured (defendant) does not disqualify them as a potential intervener as liability against their insured will mean that they become legally liable to satisfy any judgment, *albeit* through their insured. This necessarily affects their pocket as well. I am of the considered view that merely because liability under a judgment against their insured is an eventuality that may materialise in the future, does not detract from the insurer's present right to intervene and be added as a party so that they can be heard on all the issues as affecting the insurer who will be the ultimate paymaster, assuming tortious liability is established against the defendant.

[56] In the present case under appeal, if this court were to accede to the submissions made by counsel for the plaintiff, then that would result in the running down action proceeding to trial without P & O's direct involvement as a party, with the result that the issue raised by P & O, ie, fraud and collusion as between the plaintiff and the defendant is not likely to surface during the trial. It is or should be obvious enough that if P & O are not made a party to the running down action, then no one will raise this issue. So, if there is indeed fraud and collusion, then the plaintiff and defendant would not say or do anything during the trial with

respect to the issue of fraud and collusion as this would jeopardise the collusive pact that exists between them (assuming there is one in the first place). It therefore becomes self evident that it is necessary that P & O be made a party to the running down action so that fraud and collusion are raised and responded to accordingly (by pleadings and evidence) by those making and against whom the charge is made.

[57] Another point that I had to consider is the point made by counsel for P & O who said that they should be allowed to intervene and added as co-defendant as the solicitor acting for the defendant, regardless of whether they were appointed by P & O or not, cannot cross-examine or put to their own client that there was fraud and collusion between the plaintiff and the defendant. Here, the position of Messrs K Suganthi & Company is invidious to say the least. It is not in dispute that they were appointed by P & O to have conduct of the defence. But that's only in so far as the policy of insurance between P & O and the defendant is concerned, which allows P & O to take over conduct of the defence and to do all things necessary with respect to the running down action. So the defendant is only a nominal party. In almost every respect P & O will call the shots, so to speak.

[58] However, there is an important distinction that must be made and the line clearly drawn when it comes to the conduct of the running down action. Messrs K Suganthi & Company who are on record for the defendant are, in so far as the proceedings are concerned, solicitors for the defendant. In the running down action, the defendant has certain rights, recognised by law, with respect to the conduct of the case. In most cases, this is a non-issue, as the defendant will be nonchalant and indifferent to the outcome of the running down action in the civil court.

[59] Of course, it may or will be different if the insured is charged for an offence under the Road Transport Act 1987 or any subsidiary legislation thereunder, in which case the insured will have every reason to worry as he may lose his driving licence and/or pay a hefty fine or in the extreme of case, face a jail sentence. But apart from that, the insured will mostly be relieved that the solicitors appointed by the insurer are handling the defence and that all that the defendant has to do is to co-operate with the solicitors, meaning he has to attend at their office for pre-trial discussions and attend court for hearing etc. In most cases, it does not amount to anything more than that. On the contrary, if the defendant/insured refuses to co-operate, then that would be a

breach of the terms of the policy of insurance and the insurers may repudiate liability. But such repudiation of liability is only valid and effective, *vis-à-vis* the insured and insurer and does not affect or absolve the insurer of liability under s. 96(1) of the Road Transport Act 1987. That statutory liability remains intact and extant regardless of any repudiatory conduct by the insured and consequent repudiation of liability by the insurer.

[60] Now, coming back to the present set of facts, where P & O's position is that fraud and collusion has to be raised and presented during the trial process. The question is how is that to be done in the running down action? Most certainly, Messrs K Suganthi & Company cannot say or do anything to jeopardise the defendant's position by impugning their own client's conduct. As solicitors for the defendant, they have to protect their client's interest and argue the case on the basis (of the pleaded case) that this was a genuine motor vehicular accident and cannot act against his interest and promote the fraud and collusion theory of P & O. If Messrs K Suganthi & Company raise fraud and collusion either by an amendment to the pleadings or during trial, then that may be grounds for the defendant to allege misconduct against them under the Legal Profession Act 1976 and the Legal Profession (Practice & Etiquette) Rules 1978.

[61] So the interesting question in such a situation is, who in law, is the client of Messrs K Suganthi & Company in so far as the running down action is concerned and whose interests do they have to protect? The answer to that conundrum is to be found in the case of *Re Crocker* [1936] 2 All ER p. 899. In that case a motorist was involved in a collision in which his passenger was injured. The passenger brought an action against the motorist for damages for negligence. The motorist was insured against third party risks and it was a condition of the policy that the insurers shall have absolute conduct and control of all or any proceedings against the insured. The insurance company duly instructed a firm of solicitors to act for the motorist in the action brought against him. In that action negligence was admitted and the passenger was awarded damages. The motorist asserted that he had not authorised the insurance company to admit negligence, and he applied to the solicitors for production and inspection of the documents related to the trial. The solicitors refused to produce the documents on the ground that they belonged to the insurance company. The motorist thereupon took out a summons asking, *inter alia*, for an order for production. It was held that there was

nothing in the condition in the insurance policy, that the insurance company were to have the conduct and control of all proceedings, which took away the motorist's right to see the documents relating to the action in which he was a party and an order for production should be made. What is significant is that in that case the court recognised that although selected by the insurer, the solicitor was in law, the solicitor for the insured. This is what the court said:

> But what I wish to emphasise is this, that throughout the hearing of this summons it was not in dispute, and cannot be in dispute, **that the solicitors, through selected by the insurance company, were, in all matters concerning the action, the solicitors of the applicant,** who was a party to the action, the insurance company not being, of course, parties to the action. And thus, in respect of the duty which the solicitors owned to the applicant as his solicitors, the applicant under the ordinary rule would be entitled to have access to all the documents which were concerned with the matter in which the solicitors were acting as such for him. (emphasis added)

[62] So it is clear that in law, the client is the defendant and not P & O. Of course the reality is otherwise but we are here examining not the reality but the true legal position. Consequently, and because of the legal obstacle that stands in the way of Messrs K Suganthi & Company and the limitations that they will face as solicitors for the defendant in the running down action, it becomes imperative that P & O as the party who is in law, legally liable to satisfy any judgment that may be entered against the defendant, be allowed to intervene and added as a party to the action. Of course, whether there is collusion or not remains to be seen but that is not to be tested at this stage. All that matters presently is whether or not the application to intervene was made *bona fide* and timeously.

[63] Needless to say, any dilatoriness on the part of the insurers may well affect the exercise of discretion by the court hearing the application to intervene. Also, any conduct by the insurers which calls into question their motives or *bona fides* would also impact upon the exercise of discretion. In the present case the application to intervene was made on 13 December 2012 ie, about six months after defence was filed and well before any trial date had even been fixed. There was no suggestion by the plaintiff that there was any undue delay on the part of P & O. Also it was not suggested that the application to intervene was other than a *bona fide* one. However, delay was a significant and predominant feature

in the *Badruzamani*'s case. There the trial had commenced on 24 September 1997 and the application to intervene by the insurer was only made on 20 February 1999. This led the High Court to conclude that there was inordinate delay and waiver on the part of the insurer.

[64] Next, from a procedural standpoint, the High Court held in the *Badruzamani's* case that the application to intervene was flawed as the proposed intervener had not asked for a consequential prayer that they be added as a co-defendant. Both of these vitiating factors are absent in the present under appeal before me. First, there was no undue delay on the part of P & O. Next, P & O very properly applied to intervene and be added as a co-defendant. They took the proper procedural steps as enunciated by the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770, per Justice Gopal Sri Ram, who said:

> What ought to have been done is this. When the intervener was given notice of the suit and of the injunction obtained therein, its solicitors ought to have written to the plaintiffs' solicitors putting them to their election. that they either add their client as a co-defendant to the action and amend their statement of claim to raise a case against the intervener or that an application in that behalf would be made by the intervener. If the plaintiffs had demurred upon that request, then the application for intervention could and should have been made. In any event, when the application came to be made, there ought to have been a prayer in the summons asking for an order that the intervener be added as a co-defendant and for directions on the delivery of pleadings by the parties, including a direction requiring the plaintiffs to plead their case against the added co-defendant. No difficulty on this last requirement would have been encountered because there were the necessary averments in paras. 60, 61 and 64 of the statement of claim ...

[65] I am mindful that the plaintiff has alleged that P & O's basis of the allegation of fraud and collusion was flimsy. Also, the plaintiff took issue with the non-production of the adjusters' report to reveal the contents thereof. Of course, if produced, the adjusters report may well have bolstered the application to intervene. But, there could be all kinds of reasons for not producing the adjusters report. But those reasons need not be articulated or tested at this stage. If P & O refuses to produce the adjusters report at some point in time before the trial then the plaintiff may apply for discovery and production of that report,

subject of course to any issue of privilege that may attach to that report. Again, the issue of discovery, production and privilege of the adjusters report are all at large and nothing that I have said in this judgment should be taken as suggesting that there should be discovery or that privilege does not apply. Those are all matters that should be articulated at the appropriate juncture of the case in the lower court.

Appellate Court: Interfering With Discretion

[66] Whatever the case may be, it bears reminding that this is an appeal against the exercise of discretion and it is generally the case that an appellate court will not readily or lightly interfere with the lower courts exercise of discretion, unless it can be demonstrated to the appellate court that there was some serious misdirection or error on the part of the lower court or that the decision of the lower court with respect to the exercise of discretion was patently wrong. The general rule is that an appellate court will not interfere with the exercise of discretion by the judge in chambers unless it is clear that the judge's discretion was wrongly exercised. This proposition of law can be distilled from the following cases:

(a) *Evans v. Bartlam* [1937] 2 All ER 646 (HL) at, per Lord Atkin:

> Appellate jurisdiction is always statutory; there is in the statute no restriction upon the jurisdiction of the Court of Appeal, and, while the appellate court, in the exercise of its appellate power, is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet, if it sees that, on other grounds, the decision will result in injustice being done, it has both the power and the duty to remedy it;

(b) *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 1 MLJ 228 at p. 650 (PC), per Lord Guest: The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton and Company v. Johnston* [1942] AC 130 at p. 229 per Lord Wright). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v. Bartlam* [1937] AC 473 p. 148). Upon questions of procedure

the board is slow to interfere with the discretion exercised by a local court (*The Mayor, Aldermen, and Citizens of the City of Montreal v. Thomas Storrow Brown and James K Springle (Commissioners in Re Expropriation of St Joseph Street)* (1876) 2 App Cas 168).

(c) *Charles Osenton and Company v. Johnston* [1942] AC 130 (HL) at, per Viscount Simon LC:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

[67] And so this appeal is essentially as against a decision predicated on the exercise of discretion by the learned Sessions Judge who had appreciated the (affidavit) evidence that was presented before her and concluded that it was appropriate that P & O be allowed to intervene and added as a co-defendant. In so doing she was merely allowing P & O an opportunity to state their case and present the evidence in relation to the allegation of fraud and collusion that they say exists between the plaintiff and the defendant. After all it was no less than Diplock LJ (as he then was) who said so famously in at p. 336 of the judgment in *Gurtner v. Circuit* (*supra*) (a case so heavily relied upon by counsel for the plaintiff) that:

> Clearly the rules of natural justice require that a person who is bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, in my view, effectively and completely "adjudicated upon" (my italic) unless the rules of natural justice are observed and all those who will be liable to satisfy the judgment are given an opportunity to be heard.

[68] That is precisely what P & O is seeking; an opportunity of being heard. The plaintiff says that P & O should wait (by the side lines) until the running down action is disposed off and then raise issues of fraud and collusion at the execution stage. I take the view that the decision of the Sessions Court Judge is the correct one. It must be borne in mind that the application to intervene is only an interlocutory application. It does not deal with and/or finally dispose and conclusively determine the rights of the parties to the action. Hence, at the stage of intervening, there should not be a heavy burden imposed on the intervener to establish its case for intervention. All that the intervener should demonstrate is that they have acted timeously and without any *mala fide* and have a *prima facie* case for intervention in the sense that the reasons for intervention should not be baseless and frivolous or lacking in credibility. Having said that, it is of course desirable but not mandatory or imperative that the adjusters report or the interview statement between the adjusters and the insured (defendant) be disclosed at the stage of intervention. Again, it all depends on the circumstances. In the present case, it cannot be said that the grounds relied upon are totally frivolous. All that can be said is that the grounds relied upon by P & O as suggestive of fraud and/or collusion can only be explored, tested and/or repudiated in a trial by *viva-voce* evidence. So for instance, the contradictory statement that was given by the defendant to the adjusters would have to be tested at the trial. Also, the defendant would need to explain the circumstances that led him to lodge a report almost days after the accident. All of these raise searching questions and cannot be ventilated unless P & O are a party to the running down action and are permitted to actively pursue their fraud and collusion theory against the plaintiff and defendant.

[69] On the point made by counsel for plaintiff that P & O will able to raise fraud and collusion during recovery proceedings, I am of the considered view that reliance upon the judgment of the Court of Appeal in *Letchumanan*'s case may be misplaced because there are recent decisions by the Court of Appeal which postulate that the claimant in a running down matter need not file recovery proceedings against an insurer and that the insurer's statutory liability to satisfy the judgment arises upon the pronouncement of judgment in favour of the plaintiff. In *Rayappen a/l Ferdandis & Rokumoney a/p Velautham v. B H Insurance (M) Bhd etc* (Rayuan Sivil No. W-02 (In) NCC-3000-2010, the Court of Appeal said as follows:

> We agree with the Appellants that by virtue of subsection 96(1) of the RTA the plaintiff in a motor accident negligence case who has obtained a judgment in his favour against the defendant is entitled to enforce that judgment against the defendant's insurer without need to commence separate recovery proceedings against the insurer.

Also in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947 Ramly Ali JCA said at p. 957:

> Nowhere does s. 96(1) of the Road Transport Act 1987 say that the respondent must first obtain another judgment against the appellant before she can proceed to enforce the judgment earlier obtained by the respondent against the insured. Therefore, the question of the respondent having to file a recovery proceedings under s. 96(1) against the appellant, as contended by the appellant in its memorandum of appeal, does not arise at all. In short, the respondent, who had obtained a monetary judgment against the insured which has not been stayed, has the right under s. 96(1) to enforce the said judgment against the insurer without having to first file a recovery proceedings against the insurer.

[70] As such, if recovery proceedings are not commenced, then the opportunity may not present itself to P & O in order to raise fund and collusion. Also, since the fraud and collusion issue is within the present knowledge of P & O, it is only appropriate that it be raised and ventilated and determined at the earliest opportunity in the running down action as fraud and collusion and should not be postponed to another date for it to be ventilated before another judicial forum as that would mean that the Sessions Court which is to hear the running down action is inherently being allowed to hear and determined the case based on what could potentially be false evidence.

[71] In my view, allowing P & O to intervene at this stage in the running down action would avoid multiplicity of actions and wastage of the court's time and resources and quite possibly prevent the occurrence or perpetration of an injustice against P & O. Hence, it is only reasonable, sensible and appropriate that all issues be ventilated and determined in the running down action in one action rather than truncating the issue and allowing fraud and collusion to be taken up in another forum which for reasons already discussed above, may not materialise and the opportunity to raise these issues may be lost. Such a prospect would be inequitable and unfair to P & O, who are the ultimate paymasters in respect of any judgment that may be made against the defendant (their insured).

[72] It is my considered view that once an order for intervention is made and P & O is added as co-defendant, the next step would be for the court to give appropriate directions for amendment and delivery of pleadings. As such, it is no answer for the plaintiff to say that following *Tajjul Ariffin* (*supra*), they can circumvent the order for intervention and apply to strike out P & O as a party against whom they seek no reliefs. If the plaintiff takes (or is allowed to take) that route and subverts the order for intervention, then that would result in an unjust outcome as the jurisprudence on intervention will be made to stand on its head in that every successful intervener may find itself being jettisoned from the case on the basis of the *Tajjul Ariffin* decision. In any event, I do not consider the *Tajjul Ariffin*'s case to be particularly relevant as the facts there were quite different. In that case, one tortfeasor applied to add a joint tortfeasor as co-defendant and sought to compel the plaintiff to plead as against the co-defendant who had been added. Here, P & O are not a joint tortfeasors. They are in reality and statutorily the substantive defendant in so far as the judgment is concerned and it is they who applied to intervene. Their legal and pecuniary interest are at stake and if they are left out, they may be adversely and irreversibly affected by the outcome of the running down action. The plaintiff is not being (and following *Tajjul Ariffin* cannot be) compelled to plead anything against P & O. The simple answer to the pleading point that was raised by counsel for the plaintiff is that consequent upon the order for intervention further orders or directions should be sought as regards amendments to the cause papers to reflect P & O as second defendant and for the plaintiff to amend the statement of claim to reflect P & O's status in the running down action. I would venture to state that as the plaintiff has no substantive allegations whatsoever to plead against P & O, all that the plaintiff need plead in the amended statement of claim (as a consequence of the order to intervene) is that, "P & O were the insurers of motorcycle No: PHP 2167 at the material time of the motor vehicular accident and have been added as second defendant pursuant to an order of the court dated 9 May 2013". Then it would be up to P & O to plead fraud and collusion in their defence, which in turn will necessitate a robust response from the plaintiff by way of a reply to P & O's defence. To my mind, with appropriate and measured directions on amendment to pleadings (along the lines that I have indicated in italics above) there will be no scope for the plaintiff to employ the *Tajjul Ariffin* strategy in order to subvert and scuttle the order for intervention (assuming that is indeed the plaintiff's intention).

[73] I am prepared to accept the *Badruzamani*'s case only to the extent that in that case, intervention was rightly refused because of delay/waiver by the insurer and the procedural mistake of not seeking a consequential order to be added as a co-defendant. Therefore, I am not inclined to follow the *Badruzamani*'s case which postulates that intervention should be refused if the proposed intervener's liability is contingent and/or that the proposed intervener already has some contractual right to be involved with the case in which it seeks to intervene. Finally, I am of the view that the analysis of the law on intervention and views articulated in *Thomas Alvin Cross v. Thomson Thomas & Ors* [2005] 6 CLJ 61, *Kimile Dangea v. MSIG Insurance (M) Bhd* [2010] 1 LNS 1912; [2013] 7 MLJ 576 and *Khairah Binti Othman v. Kurnia Insurance* (Mahkamah Tinggi Shah Alam Rayuan Sivil No. Al2-723-2010) are correctly stated and applied.

[74] On the basis of the facts and circumstances as stated above, I concluded that it would be most unjust to have allowed P & O to have sat on the sidelines, whilst waiting for the running down action to run its course and wait for the judgment and then only take steps to oppose or challenge it on the basis of fraud and collusion. I am of the considered opinion that regardless as to whether P & O's charge and evidence in support of fraud and collusion will eventually stand up to curial scrutiny, as a matter of principle they should be allowed to intervene and do not have to be kept waiting for the impugned judgment to materialise and then only invoke the principle that "fraud unravels everything" as that would be taking the principle to the point of absurdity. Hence, as soon as the insurer has reason to believe that there is fraud and collusion between the insured and the third party claimant, they should, as a party whose legal and financial interest will be affected by the outcome in the running down action, promptly move the court under O. 15 r. 6(2)(b)(ii) of the Rules of Court 2012 to intervene. This exactly what P & O has done in this case. Hence, on the present facts, P & O should not be compelled to wait by the sidelines and then only raise fraud and collusion in subsequent litigation ie, at the stage of recovery or execution (assuming either of those two stages do materialise).

[75] On a final note, on the issue as to whether Messrs K Suganthi & Company should continue to have conduct of the defence on behalf of the defendant, I am of the view that that is a matter for P & O to decide in view of the awkward position that the firm will find themselves in if they were to continue to be on P & O's payroll and yet assert at the trial that this was a

genuine motor-vehicular accident. In any case, it matters not whether Messrs K Suganthi & Company are still on record as solicitors for the defendant and that fact in and of itself does not and cannot impact upon P & O's entitlement to intervene on the basis of the allegation of fraud and collusion that is said to exist between the plaintiff and the defendant.

[76] Assuming (without concluding) that there is indeed a fraudulent and/or collusive pact between the plaintiff and defendant, then to allow these two parties to dictate the outcome of the case, without P & O's involvement as a necessary party, would in my view be injurious not just to P & O but also to the justice system and justice itself. Whilst it is trite that fraud unravels everything, it is equally compelling that a party whose legal and financial interest would be detrimentally affected by any fraudulent and/or collusive pact be allowed to intervene, at the very least to prevent the fraudulent and/or collusive pact from culminating or crystallising into a judgment.

[77] In all the circumstances, I was of the considered opinion that this was a fit and proper case for intervention and P & O were very properly allowed to intervene and added as second defendant. As such, I was impelled to the view that the appeal lacked merit.

The Outcome

[78] For the reasons as stated above, I dismissed the plaintiff's appeal. I ordered the plaintiff to pay costs of RM2,000 to the respondent (P & O). Turning now to the running down action, it appears that it has been kept in abeyance pending the outcome of this appeal. After I had delivered my decision, the plaintiff/appellant's counsel intimated that his client would be taking this matter up on appeal to the Court of Appeal as it raised a matter of general importance to the insurance industry and specifically to running down actions. As such, and at the request of both parties, I ordered that the running down action in the Sessions Court be stayed pending the outcome of the plaintiff's application for leave to appeal to the Court of Appeal. In the event the plaintiff fails to make an application for leave within two weeks from the date of this order then the stay lapses and the running down will proceed to trial.